STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2008AP1608-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARY A. SIDOFF,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN GREEN COUNTY CIRCUIT COURT, THE HONORABLE JAMES R. BEER PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

QUESTIONS PRESENTED

1. Where defense counsel did not object or suggest changes to the self-defense instruction in this trial on a charge of first-degree intentional homicide, did the circuit court err by not including in the instruction any reference to the privilege "to threaten force . . . against another"?

   - The circuit court answered "No."
   - This court should answer "No."

2. Where defense counsel did not object to the State's request for instructions on the lesser-included offenses of first- and second-degree

reckless homicide, did the circuit court err when it instructed the jury on those lesser-included offenses?

- The circuit court answered "No."
- This court should answer "No."

3. Where defense counsel did not request an instruction on the lesser-included offense of homicide by negligent handling of a dangerous weapon, did the circuit court err when it did not *sua sponte* instruct the jury on that lesser-included offense?

   - The circuit court answered "No."
   - This court should answer "No."

4. Did defense counsel provide ineffective assistance when he did not object to the omission of any reference to the privilege "to threaten force . . . against another" from the self-defense instruction?

   - The circuit court answered "No."
   - This court should answer "No."

5. Did defense counsel provide ineffective assistance when he did not object to the State's request for instructions on the lesser-included offenses of first- and second-degree reckless homicide?

   - The circuit court answered "No."
   - This court should answer "No."

6. Did defense counsel provide ineffective assistance when he did not request an instruction on

the lesser-included offense of homicide by negligent handling of a dangerous weapon?

- ➢ The circuit court answered "No."
- ➢ This court should answer "No."

7. Does this case warrant the exercise of this court's discretionary authority under Wis. Stat. § 752.35 to grant a new trial in the interest of justice on the ground that "the real controversy has not been fully tried"?

- ➢ The circuit court declared that "Defendant Sidoff is not entitled to a new trial in the interest of justice. This court found that Sidoff knowingly selected her trial strategy. Having lost with that strategy, she does not warrant a new trial to try out another" (139:6, R-Ap. 108).
- ➢ This court should not grant a new trial in the interest of justice.

SUMMARY OF THE CASE

The State charged defendant-appellant Mary A. Sidoff with first-degree intentional homicide in the death of Ardelle L. Sturzenegger.[1] In a pre-arrest interview with law enforcement officers from the Green County Sheriff's Department and the

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[1] The State also charged Sidoff with two other crimes related to the homicide: hiding a corpse, and theft of movable property from a corpse (4:1, R-Ap. 129). Sidoff's claims in this appeal relate to only her conviction for first-degree intentional homicide. She has not challenged her convictions for the other two crimes (111:2, R-Ap. 102).

Janesville Police Department, and with her attorney present throughout the interview, Sidoff acknowledged shooting Sturzenegger in the back of the head, but claimed the shooting occurred accidentally and that she only intended to threaten Sturzenegger in order to get Sturzenegger to let go of one of Sidoff's sons, whom, Sidoff said, Sturzenegger had grabbed and held. During a nine-day jury trial, the State produced evidence that the killing occurred execution-style and could not have occurred the way Sidoff described in her pre-arrest interview. Sidoff testified at trial, denied that she had anything to do with the killing, said that her husband had killed Sturzenegger, and said that her husband had persuaded her to make up the confession she related in her pre-arrest interview.

The circuit court instructed the jury on first-degree intentional homicide and, at the State's request and without objection from Sidoff, on the lesser-included offenses of second-degree intentional homicide and first- and second-degree reckless homicide. The jury convicted Sidoff of first-degree intentional homicide.

Sidoff filed a motion for postconviction relief. She alleged judicial error in the jury instructions. She also alleged ineffective assistance of counsel for failing to object to allegedly erroneous jury instructions and for failing to request an instruction on a specific lesser-included offense. At the ensuing ***Machner***[2] hearing, defense counsel testified

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[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

without contradiction that he and Sidoff agreed pretrial that he would pursue an "all or nothing" strategy that sought outright acquittal on the charge of first-degree intentional homicide rather than seek a conviction on a lesser-included offense. The circuit court denied Sidoff's motion.

This appeal followed.

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the court's opinion.

STATUTES INVOLVED[3]

WIS. STAT. § 939.24 CRIMINAL RECKLESSNESS (2005-06 EDITION).

> **939.24 Criminal recklessness. (1)** In this section, "criminal recklessness" means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk, except that for purposes of ss. 940.02 (1m), 940.06 (2) and 940.23 (1) (b) and (2) (b), "criminal recklessness" means that the actor creates an unreasonable and substantial risk of death or great bodily harm to an unborn child, to the

[3] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2007-08 edition.

woman who is pregnant with that unborn child or to another and the actor is aware of that risk.

(2) Except as provided in ss. 940.285, 940.29, 940.295, and 943.76, if criminal recklessness is an element of a crime in chs. 939 to 951, the recklessness is indicated by the term "reckless" or "recklessly".

. . . .

WIS. STAT. § 939.25 CRIMINAL NEGLIGENCE (2005-06 EDITION).

939.25 Criminal negligence. (1) In this section, "criminal negligence" means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another, except that for purposes of ss. 940.08 (2), 940.10 (2) and 940.24 (2), "criminal negligence" means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to an unborn child, to the woman who is pregnant with that unborn child or to another.

(2) If criminal negligence is an element of a crime in chs. 939 to 951 or s. 346.62, the negligence is indicated by the term "negligent" or "negligently".

WIS. STAT. § 939.48 SELF-DEFENSE AND DEFENSE OF OTHERS (2005-06 EDITION).

939.48 Self-defense and defense of others. (1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasona-

bly believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

. . . .

(4) A person is privileged to defend a 3rd person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the 3rd person would be privileged to act in self-defense and that the person's intervention is necessary for the protection of the 3rd person.

. . . .

(6) In this section "unlawful" means either tortious or expressly prohibited by criminal law or both.

WIS. STAT. § 940.01 FIRST-DEGREE INTENTIONAL HOMICIDE (2005-06 EDITION).

940.01 First-degree intentional homicide. (1) OFFENSES. (a) Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

(b) Except as provided in sub. (2), whoever causes the death of an unborn child with intent to kill that unborn child, kill the woman who is pregnant with that unborn child or kill another is guilty of a Class A felony.

(2) MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:

(a) *Adequate provocation.* Death was caused under the influence of adequate provocation as defined in s. 939.44.

(b) *Unnecessary defensive force.* Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to

defend the endangered person, if either belief was unreasonable.

(c) *Prevention of felony.* Death was caused because the actor believed that the force used was necessary in the exercise of the privilege to prevent or terminate the commission of a felony, if that belief was unreasonable.

(d) *Coercion; necessity.* Death was caused in the exercise of a privilege under s. 939.45 (1).

(3) BURDEN OF PROOF. When the existence of an affirmative defense under sub. (2) has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt under sub. (1).

WIS. STAT. § 940.02 FIRST-DEGREE RECKLESS HOMICIDE (2005-06 EDITION).

940.02 First-degree reckless homicide. (1) Whoever recklessly causes the death of another human being under circumstances which show utter disregard for human life is guilty of a Class B felony.

. . . .

WIS. STAT. § 940.05 SECOND-DEGREE INTENTIONAL HOMICIDE (2005-06 EDITION).

940.05 Second-degree intentional homicide. (1) Whoever causes the death of another human being with intent to kill that person or another is guilty of a Class B felony if:

(a) In prosecutions under s. 940.01, the state fails to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01 (2) did not exist as required by s. 940.01 (3); or

(b) The state concedes that it is unable to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01 (2) did not exist. By charging under this section, the state so concedes.

(2) In prosecutions under sub. (1), it is sufficient to allege and prove that the defendant caused the

death of another human being with intent to kill that person or another.

. . . .

(3) The mitigating circumstances specified in s. 940.01 (2) are not defenses to prosecution for this offense.

WIS. STAT. § 940.06 SECOND-DEGREE RECKLESS HOMICIDE (2005-06 EDITION).

940.06 Second-degree reckless homicide. (1) Whoever recklessly causes the death of another human being is guilty of a Class D felony.

. . . .

WIS. STAT. § 940.08 HOMICIDE BY NEGLIGENT HANDLING OF DANGEROUS WEAPON, EXPLOSIVES OR FIRE (2005-06 EDITION).

940.08 Homicide by negligent handling of dangerous weapon, explosives or fire. (1) Whoever causes the death of another human being by the negligent operation or handling of a dangerous weapon, explosives or fire is guilty of a Class G felony.

. . . .

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.[4] Instead, the State will present additional facts in the "Argument" portion of its brief.

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[4] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2007-08 edition.

STANDARD OF REVIEW

> The standard of review for ineffective assistance of counsel's components of deficient performance and prejudice present mixed questions of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)). A circuit court's findings of historic fact, "'the underlying findings of what happened,'" will not be overturned unless clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Questions of whether counsel's performance was deficient and prejudicial are questions of law we review de novo. *Id.*

State v. Fonte, 2005 WI 77, ¶ 11, 281 Wis. 2d 654, 698 N.W.2d 594.

SUMMARY OF THE STATE'S POSITION

The circuit court did not commit any error in the jury instructions. The court gave instructions requested by the parties and did not have any duty to insert any language or instruction not requested by either party. The evidence at trial justified the instructions the court gave, and the instructions correctly advised the jury about the law applicable to the facts presented at trial. The evidence at trial did not justify an instruction on homicide by negligent handling of a dangerous weapon. Even if the court erred, however, the error did not harm Sidoff.

Defense counsel provided constitutionally effective assistance to Sidoff. Counsel and Sidoff agreed before trial that counsel would pursue an "all or nothing" strategy at trial. Counsel followed that strategy throughout the trial. Counsel's lack of objection to the omission of certain language

from a jury instruction, lack of objection to instructions on two lesser-included offenses, and decision not to request an instruction on a specific lesser-included offense all comported with that strategy. Even if counsel performed deficiently, however, the alleged deficiencies did not cause Sidoff any prejudice.

The case does not merit a new trial in the interest of justice. Defense counsel presented the case he and Sidoff agreed he should present, and the jury decided the case on the issues Sidoff put in play. Sidoff has not suggested any way in which the evidence at a new trial would differ from the evidence at the trial underlying this appeal. Even if a new trial cured all the defects Sidoff laments from her first trial, a jury would not have any reason to acquit Sidoff of first- or second-degree intentional homicide and instead find Sturzenegger's death a result of criminal negligence. In effect, Sidoff seeks a new trial because of her buyer's remorse. Buyer's remorse does not justify a new trial in the interest of justice.

ARGUMENT

I. SUMMARY OF SIDOFF'S CLAIMS.

In her postconviction motions (130, R-Ap. 163-98; 136, R-Ap. 199-204), Sidoff presented claims of error against the circuit court and against her trial lawyer. She contended that the circuit court erred by:

- failing to include in the self-defense instruction any language referring to her privilege

to threaten the use of force (130:1-5, R-Ap. 163-67); and

- incorrectly instructing the jury on the appropriate lesser-included offenses, including (apparently) failing to offer *sua sponte* an instruction not requested by either the State or defense counsel (130:1, 5-9, R-Ap. 163, 167-71).

She contended that her trial lawyer erred by:

- failing to object to the omission from the self-defense instruction of any language referring to her privilege to threaten the use of force (130:2, R-Ap. 164); and

- failing to object to the circuit court's allegedly incorrect instructions on the appropriate lesser-included offenses, including failing to request an instruction on the lesser-included offense of homicide by negligent handling of a dangerous weapon (130:2, R-Ap. 164).

Sidoff also asserted a claim that the alleged instructional errors justify a new trial in the interest of justice because the erroneous instructions prevented the jury from trying the real controversy (130:10, R-Ap. 172).

Sidoff reiterates these claims on appeal.

II. SUMMARY OF FACTS RELEVANT TO CLAIMS OF ERROR IN JURY INSTRUCTIONS.

A. Mary Sidoff's Pre-arrest Interview.

On October 22, 2005, Sidoff participated in an interview at the Green County Sheriff's Department (170:Ex. 53, at 1, R-Ap. 225).[5] The interview began at 1:10 p.m. (170:Ex. 53, at 1, R-Ap. 225) and ended at 3:12 p.m. the same day (170:Ex. 53, at 49, R-Ap. 273), with Sidoff's attorney present throughout (170:Ex. 53, at 1, 49, R-Ap. 225, 273). Janesville Police Detective Erik Goth and Green County Sheriff's Detectives Kevin J. Bohren and Terry Argue conducted the interview (170:Ex. 53, at 1, R-Ap. 225), with Detective Bohren taking the lead.

Sidoff identified October 11, 2005 as the date of Ardelle Sturzenegger's death (170:Ex. 53, at 3, R-Ap. 227). The confrontation occurred in the dining room of Sidoff's home (170:Ex. 53, at 31, R-Ap. 255). During a heated discussion relating to Sturzenegger's daughter. Mary Jo (170:Ex. 53, at 32-33, R-Ap. 256-57), Sturzenegger grabbed Braxton (one of Sidoff's sons) standing nearby (170:Ex. 53, at 33, R-Ap. 257). Sidoff said Sturzenegger "had one arm around [Braxton's] waist and he was

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[5] At trial, the State presented an audio recording of the interview (170:Ex. 52) along with a transcript of the interview (170:Ex. 53, R-Ap. 225-73). *See* 152:491-92.

struggling with her and he was falling" (170:Ex. 53, at 33, R-Ap. 257).

> I told her to give him back to me and I tried to take him away and she was just holding him. She was holding him and he was crying and. . . I was scared she was gonna hurt him because she was so angry, she was just, she wanted, and told him, I told her to give him back to me. . . . [S]he said if she, she said let me see Mary Jo and I'll let go of him and I ran upstairs and I got my husband's gun that's . . . in his dresser. I figured if she saw it . . . she'd let go of him and she'd leave.

(170:Ex. 53, at 33, R-Ap. 257.) Sidoff said "my husband said he leaves it in there with the safety on, so I just thought the safety was on" (170:Ex. 53, at 35, R-Ap. 259). She said she knew how to load the gun, and the gun already had an ammunition clip in it (170:Ex. 53, at 35, R-Ap. 259).

She said she went back downstairs, where she "wanted to scare [Sturzenegger]. I wanted her to leave and I wanted her to let go of Braxton. I just wanted her to let go" (170:Ex. 53, at 35, R-Ap. 259) Sidoff said that when she returned downstairs, she saw that Braxton "was falling and [Sturzenegger] had . . . her arm around like his neck trying to like keep him up" (170:Ex. 53, at 35, R-Ap. 259).

> [S]he was hurting him. He was screaming and crying and she was, she wouldn't give him to me. And so I went up to, I went up to her and I pointed the gun at her and I said . . . I told her to let go and don't even . . . and it went off, it went off and I didn't . . ."

(170:Ex. 53, at 35-36, R-Ap. 259-60.)

Sidoff said she pointed the gun at the back of Sturzenegger's head (170:Ex. 53, at 36, R-Ap. 260) and thought she had touched the gun to the back of Sturzenegger's head (170:Ex. 53, at 37, R-Ap. 261). Sidoff said Sturzenegger could not see the gun, but Sidoff "had told her I had it" (170:Ex. 53, at 37, R-Ap. 261).

Sidoff described Sturzenegger's position while holding Braxton as "kinda hunched over" (170:Ex. 53, at 37, R-Ap. 261). Sidoff said she did not mean to shoot Sturzenegger (170:Ex. 53, at 36, R-Ap. 260).

At the trial, jurors heard the audio recording of the interview (152:492) as they followed along with the transcript (152:491-92).

B. Bloodstain And Weapons Evidence.

At the trial, William L. Newhouse, a forensic scientist at the Wisconsin State Crime Laboratory (156:915), testified extensively about his analysis of blood-spatter patterns found at the crime scene (156:925-66). He concluded that "the moment the bullet exited [the victim's] chin, her chin was approximately somewhere in this range of 9 to 18 inches off the floor. Above the floor" (156:965; *see also* 156:1019, 1039; 170:Ex. 197 (p. 2 of report dated Jan. 13, 2006)).

Newhouse also testified about the operating characteristics of the weapon used to kill Sturzenegger (156:972-79), including the amount of pressure required to pull the trigger and fire a shot (156:977-78).

In order to cock the weapon to prepare it to shoot, you would pull the part of the gun called the slide back and then release it. It's spring actuated. It would drive forward, and as the slide moves forward it pushes a cartridge off of the magazine and into a part of the gun called the chamber. At the same time it cocks the pistol. That is this — you see it looks like a little hole in it, it does have a little hole in it, that's the hammer of the gun.

You pull the slide back, letting go of the slide moves a cartridge into the chamber and cocks the hammer on the pistol. And at that point if I pull the trigger and there's a cartridge in there, it's going to fire.

Now, it's a semiautomatic pistol because when I fire that pistol, it drives that slide back using the energy of the cartridge going off, ejects the cartridge casing, there's a little extractor and an ejector inside the chamber that are designed to pull that cartridge casing back and kick it out of the gun — you have all seen this on TV I'm sure — then the slide moves forward and picks up the next cartridge and now it also cocks the gun. I can pull the trigger again and it will fire that second round.

(156:973-74.) Newhouse described the firearm as capable of firing in either single-action or double-action mode:

A single action pistol is one that you have to cock the hammer first and then pull the trigger. A double action pistol is one that . . . if I pull the trigger with a round in the chamber, it pulls the hammer back. And when I pull the trigger all of the way back, the hammer is allowed to drop onto the cartridge and it fires and everything else functions the same.

So there's two ways to shoot the gun. I can manually cock the hammer and then pull the trig-

ger, or I can pull the trigger which pulls the hammer back and allows it to drop. In both instances the gun will fire if there's a cartridge in the chamber.

(156:976.)

You have to apply a certain amount of pressure to the trigger to get the hammer to drop. And in any weapon that has the capability of firing in both double action and single action, there is a difference in the amount of pressure that you have to apply to the trigger to cause the gun to shoot.

In the single action mode, where pulling the trigger is only firing the gun and not cocking the gun, you require much less pressure. Single action on this gun, too, I didn't measure trigger pull. I could have. But it was a normal trigger pull. So the trigger pull, I would estimate on this gun in single action, would be four to eight pounds. That would be a normal range — maybe three to eight pounds.

Double action where I pull the trigger and that action cocks and fires the weapon is generally going to be somewhere in the range of 8 to 12 pounds. It could be 6 to 12 pounds, I will not give you any precise number. But the point is the more pressure is required on the trigger to fire the gun in double action than it is in a single action mode.

(156:977-78.)

C. Mary Sidoff's Trial Testimony.

Sidoff testified in her defense (162:1957-2036).[6] She said she had worked from 11:00 p.m. on Tues-

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[6] Sidoff presented five witnesses during the defense portion of the trial: herself (162:1957-2036); Green County Sheriff's Detective Kevin J. Bohren (162:1889-1934); Ryan

(footnote continues on next page)

day, October 11, to 7:00 a.m. on Wednesday, October 12 (162:1980). When she returned home from work on October 12, she found Sturzenegger there (162:1980).

Sidoff said she also saw Sturzenegger at the Sidoff home on the morning of Friday, October 14 (162:1981). Sidoff spent that day in Madison (162:1981) and said she did not see Sturzenegger after October 14 (162:1981).

On Saturday, October 15, when she returned from work, she did not find Sturzenegger there (162:1981). Sidoff's husband, David, told Sidoff that Sturzenegger "wasn't home when he got home that morning" (162:1981).

Sidoff said she "was gone Friday, Friday night, then Saturday night, Sunday night and I got home Monday — Monday night" (162:1982). On Monday night, October 17, in response to a question from Sidoff, her husband

> said that Sunday night when he got home that [he and Sturzenegger] had gotten into an argument together, and that she demanded to leave and she was going to leave, but her car wouldn't start. . . . [S]o he said that he had just taken her to Monroe and dropped her off at a motel so she could stay there.

(162:1982.)

(footnote continues from previous page)

Neil Zakrzewski, a co-worker of David Sidoff (162:1935-39); David Gardner, another co-worker of David Sidoff (162:1940-48); and Dr. Billy J. Bauman, a forensic pathologist (163:2064-83).

On Friday, October 21, Detective Goth called and asked about Sturzenegger (162:1983-84). Sidoff said that after the conversation, her husband

> said I need you to do something for me . . . . He said that something happened when I was gone, and he said that — he said that — that Ardelle had gotten shot. And he said that I should confess to it and say that it was an accident, that I was protecting my son because if it's an accident, I can't get in trouble for it, that — that if I was protecting my son.
>
> And I said why? I said what happened, I don't understand. And he said I can't — he said I can't tell you, he is just like, you need to — you just need to do this. And I said I don't understand what — and I was I was crying, and he was crying, and — he said they will believe you, Mary, and — and he said we will call Thad and Thad will know someone to help and he said — he said if I did that, we didn't — if I didn't we both could get into a lot of trouble because I was the one that called her, I was the one that met her, I was the one that brought her out to my house, and what would the boys do with both their parents gone?

(162:1985.)

D. Defense Counsel's Closing Argument.

Defense counsel presented an aggressive closing argument (164:2220-74). In keeping with Sidoff's trial testimony, counsel asserted that David Sidoff, not Mary, killed Sturzenegger. Counsel said that "I have to agree that some, if not almost all of her statements to the police and bill collectors were false" (164:2221). Moreover, he said,

> I have to agree with Mr. Luhman [the prosecutor], this is a crime committed by one person. But it wasn't Mary Sidoff. The cornerstone of the State's case . . . is that [Sturzenegger] died on October 11th. If they don't have that, they don't have a case against Mary Sidoff. The reason they say it was on the 11th is because she was known to be in contact with Ardelle and later in the afternoon she started spending money. There's no doubt that that money was Ardelle's.

(164:2227). Counsel declared that "[i]t's absolutely certain that Ardelle did not die on October 11th" (164:2229; *see also* 164:2228 ("Ardelle didn't die on the 11th")).

Counsel attacked Sidoff's confession as a concoction of David Sidoff (164:2230-36). Counsel characterized Sidoff's claim of self-defense as "an unbelievable claim" (164:2235).

Counsel repeatedly pointed the finger at David Sidoff as the perpetrator (164:2250-52, 2256, 2265-71). Counsel declared without qualification that "David killed [Sturzenegger] sometime in the early evening of the 14th through the early morning hours of the 15th" (164:2270-71). Counsel further declared that

> Mary Sidoff was not involved in any of these crimes. She didn't know it. She was coerced by her husband. . . . [S]he gave a false confession so that she could prevent him taking away her babies and leaving the marriage, and she stupidly relied on his assurance that she would only — she would get out of trouble and it would be an accident and everyone would believe her and you don't condemn a mother for protecting her children. That's stupid, but it's not criminal.

(164:2273-74.)

E. Defense Counsel's Testimony At The *Machner* Hearing.

At the ***Machner*** hearing (167, R-Ap. 412-33), defense counsel said he did not oppose the district attorney's request for instructions on lesser-included offenses because the "minimum evidence was received that would permit that" (167:8, R-Ap. 419). In addition, counsel said he did not request instructions on lesser-included offenses because they did not fit with the theory of defense (167:8, R-Ap. 419): "[W]e weren't interested in any specifics on self-defense or lesser included offenses, but there was an acknowledgment that there should be some included, assuming that the evidence that did come in, would come in" (167:6-7, R-Ap. 417-18). He said his trial strategy focused on convincing the jury that Mary Sidoff did not have any involvement in Sturzenegger's death (167:7, R-Ap. 418). Counsel said Sidoff agreed prior to trial with the theory of defense he proposed in his opening statement and that he advanced in his closing argument (167:12, R-Ap. 423).

Counsel acknowledged the "huge contradiction" between (on one hand) the statements Sidoff made in her pre-arrest interview and (on the other) her trial testimony (167:11, R-Ap. 422). He also acknowledged that if the jurors accepted the blood-spatter evidence as correct, Sidoff's pre-arrest statement "could not be true" (167:16, R-Ap. 427): in her pre-arrest statements,

> Mary came up behind the victim, put the gun to the back of her head, possibly touched the back of her head, and the gun went off. The autopsy reports

> showed that the bullet went through the top of her head, near the back, down through her chin.[7] And there is no imaginable way that her head could have been 9 to 18 inches above the floor when the bullet entered, if it happened the way Mary said in [her pre-arrest interview].

(167:16, R-Ap. 427 (footnote added).) counsel regarded Sidoff's pre-arrest statement as false in nearly every respect:

> [T]here is no question somebody shot the victim in the dining room. So, yes, there are portions [that still could be very true][8] — it's not just the irrefutable physical evidence that made this clearly a false statement, but there is probably a dozen or more reasons why it's not credible.

(167:17-18, R-Ap. 428-29.)

Postconviction counsel did not specifically ask trial counsel any questions about why trial counsel had not requested an instruction on homicide by negligent handling of a dangerous weapon.

III. THE CIRCUIT COURT DID NOT COMMIT ANY ERRORS IN INSTRUCTING THE JURY.

Sidoff contends that "[u]nder one reasonable view of the evidence, a view founded primarily in Sidoff's pre-arrest statement to the police,

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7 *See* 170:Ex. 73, at 3-4 (autopsy report).

8 167:17, R-Ap. 428 (incorporating postconviction counsel's question).

Ardelle's death had been caused unintentionally or accidentally." Sidoff's Brief at 19. Sidoff asserts that under this view, "the trial court's substantive jury instructions were erroneous or misleading in three different ways concerning this factual scenario." *Id.* at 20.

- First, the self-defense instruction referred only to the self-defense privilege to use force against another, not to the self-defense privilege to threaten force against another. *Id.* at 20-22.

- Second, the self-defense instruction defined the privilege in terms of intentional use of deadly force, thus "impliedly discount[ing] [Sidoff's] assertion that the fatal gunshot had occurred accidentally." *Id.* at 22.

- Third, the circuit court should not have instructed on first- and second-degree reckless homicide and should have instead instructed on "a single lesser included offense of homicide by negligent handling of a dangerous weapon." *Id.* at 23. *See generally id.* at 23-26.

The circuit court did not err in any of its instructions. Under applicable standards for reviewing claims like Sidoff's, this court should reject Sidoff's contentions.

> "A challenge to [a conviction based on] an allegedly erroneous jury instruction warrants reversal and a new trial only if the error [is] prejudicial." *Fischer v. Ganju,* 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992). "An error is prejudicial if it probably and not merely possibly misled the jury." *Id.* at 850. We will not re-

verse a conviction if the overall meaning communicated by the jury instructions was a correct statement of the law. *See State v. Paulson*, 106 Wis. 2d 96, 108, 315 N.W.2d 350 (1982).

Fonte, 281 Wis. 2d 654, ¶ 15.

A. The Circuit Court Did Not Err When It Used A Self-Defense Instruction That Omitted Any Reference To The Privilege To Threaten Force Against Another.

The circuit court instructed the jury with the self-defense instruction requested by the State — an instruction to which defense counsel did not object at any point during the jury instruction conference (163:2117-47, R-Ap. 356-386). Because Sidoff did not object to the self-defense instruction, she waived her right to raise this issue on appeal. ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988) (failure to object to proposed instructions at trial constitutes waiver of any right to challenge an instruction on appeal). *See also* ***State v. Booth***, 147 Wis. 2d 208, 211, 432 N.W.2d 681 (Ct. App. 1988); Wis. Stat. § (Rule) 805.13(3).[9]

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[9] Section 805.13(3) provides:

> At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed ac-

(footnote continues on next page)

Moreover, absent statutory authority, this court, with two exceptions,[10] lacks power to review a claim of error based on a failure to object to a jury instruction or a jury-verdict question.

In any event, the omission of language about the privilege to threaten the use of force did not amount to error. In her postconviction motion (130:4, R-Ap. 166), Sidoff cited three cases in support of her contention that the facts required the inclusion of "threat" language: ***State v. Watkins***,

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(footnote continues from previous page)

> tion on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.

Wis. Stat. § (Rule) 805.13(3). This rule applies to criminal proceedings. Wis. Stat. § 972.11(1). *See also* ***State v. Gomaz***, 141 Wis. 2d 302, 316-17, 414 N.W.2d 626 (1987) ("this court has previously had occasion to apply section 805.13 to criminal proceedings").

[10] This court may review a waived jury-instruction or jury-verdict error in the context of an ineffective-assistance-of-counsel claim, ***State v. Marcum***, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992) (while "the court of appeals is prohibited from reviewing instructions ... absent a timely objection," jury instructions "may be revisited under claims of ineffective assistance of counsel"), or in the exercise of the court's authority under Wis. Stat. § 752.35, *see* ***Vollmer v. Luety***, 156 Wis. 2d 1, 22, 456 N.W.2d 797 (1990) (finding authority in Wis. Stat. § 752.35 for court of appeals "to reverse a judgment notwithstanding counsel's failure to object to an erroneous verdict question.").

2002 WI 101, ¶ 58, 255 Wis. 2d 265, 647 N.W.2d 244; ***State v. Gomaz***, 141 Wis. 2d 302, 414 N.W.2d 626 (1987); and ***State v. Ambuehl***, 145 Wis. 2d 343, 425 N.W.2d 649 (Ct. App. 1988).[11] None of those cases hold (or even imply) that error results from the omission of "threat" language when the crime involves an actual homicide. In ***Watkins***, 255 Wis. 2d 265, where the defendant acknowledged threatening the victim with a gun but asserted the death occurred accidentally, the supreme court addressed the question of whether "pointing a gun at another person as a threat of force" precludes "the possibility of asserting the accident defense." ***Id.*** ¶ 58. The court held that a threat of force within the scope of Wis. Stat. § 939.48 did not preclude a defense of accident. ***Id.*** Notably, in a section titled "Claims of Self-Defense in Intentional Homicide Prosecutions," the court's analysis relied in part on the self-defense instruction found in Wis. JI-Criminal 1014. ***Id.*** ¶ 65. Without even a hint of disapproval, the court quoted language that does not include any "threat" language and refers only to "the force used." ***Id.***

In ***Gomaz***, 141 Wis. 2d 302, "the defendant admitted that she intentionally threatened the use

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[11] In her appellate brief, Sidoff cites ***State v. Watkins***, 2002 WI 101, ¶ 58, 255 Wis. 2d 265, 647 N.W.2d 244; ***Gomaz***, 141 Wis. 2d 302; and ***State v. Ambuehl***, 145 Wis. 2d 343, 425 N.W.2d 649 (Ct. App. 1988), in support of this contention. *See* Sidoff's Brief at 21-22. At the ***Machner*** hearing (167:9, R-Ap. 420), Sidoff's postconviction counsel called trial counsel's attention to ***Watkins*** and ***Ambuehl***. In a supplemental postconviction motion, she also cited ***Watkins*** and ***Ambuehl*** (136:4-5, R-Ap. 202-203).

of self-defense, did not deny that [the victim] died as a result of a stab wound from the knife that she wielded, but claimed that she did not intentionally thrust the knife into the deceased." ***Id.*** at 311. The supreme court addressed the question of whether a court could deny a defendant's request for an instruction on imperfect self-defense manslaughter (now second-degree intentional homicide)[12] when the court justifiably "instructed as to the privilege of complete self-defense." ***Id.*** at 310. The court held that a court could not properly deny the request under those circumstances. ***Id.*** As in ***Watkins***, the relevant self-defense instruction referred only to "the force used," not to threatened force. ***Gomaz***, 141 Wis. 2d at 315 n.8.

In ***Ambuehl***, 145 Wis. 2d 343, this court considered a conviction for attempted first-degree intentional homicide. ***Id.*** at 348. At trial, Ambuehl acknowledged that she pointed a .22-caliber revolver at a person attacking her companion and that she "intended 'to threaten [the assailant].'" ***Id.*** at 350. She said the gun accidentally fired when the assailant "punched her forehead." ***Id.*** "She thought she had shot [her companion], but in fact she had shot [the assailant] in the neck." ***Id.*** At trial, the court's instruction on self-defense omitted "threat" language. ***Id.*** at 369 n.10. This court concluded that the omission of the "threat" language "prevented an important part of the real controversy, whether Ambuehl merely threatened to use force to defend [her companion], from being

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[12] ***State v. Head***, 2002 WI 99, ¶ 61, 255 Wis. 2d 194, 648 N.W.2d 413.

tried." ***Id.*** at 374. This court "therefore exercise[d] [its] discretionary authority under sec. 752.35, Stats., to order a new trial." ***Id.***

Ambuehl differs significantly from this case as well as ***Watkins*** and ***Gomaz***, and the principal difference highlights the lack of error in the self-defense instruction here. Only in ***Ambuehl*** did the victim not die from the use of the force, and only in ***Ambuehl*** did the threat of force fail to merge into deadly force. Once threatened force transmutes into deadly force, the issue of the privilege to threaten force disappears and leaves only the issue of the privilege to use deadly force.

Moreover, in this case, even under a reading most favorable to Sidoff, the force occurred all but simultaneously with the alleged threat of force, making the threat an inseparable and indistinguishable component of the use.[13] *Cf.* ***State v. Baldwin***, 101 Wis. 2d 441, 450, 304 N.W.2d 742 (1981) (for purposes of jury unanimity under sexual-assault statute, court "not prepared to debate the extent to which use of force and threat of force represent different concepts"). *See also* ***State v.***

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[13] In her pre-arrest interview, Sidoff essentially described the inseparability of the alleged threat of force and the ensuing actual use of force. She said that after retrieving the gun, she returned to the dining room. She "told [Sturzenegger] I had [a gun]" and "went up to [Sturzenegger] and I pointed the gun at her" (170:Ex. 53, at 36, R-Ap. 260), touching the gun to the back of her head (170:Ex. 53, at 37, R-Ap. 261), at which point "it went off" (170:Ex. 53, at 36, R-Ap. 260). *See also* 170:Ex. 53, at 37, R-Ap. 261 ("[I]t happened so fast. It happened so fast").

Manson, 101 Wis. 2d 413, 304 N.W.2d 729 (1981) (citing *Baldwin* in discussion of "use of force" and "threat of imminent use of force" element of armed-robbery statute). Under those circumstances, the instruction properly allowed the jury to consider only whether the force actually used qualified as a legitimate exercise of self-defense (whether perfect or imperfect), resulted from an accident, or implicated some other excuse or justification.

In short, none of the cases on which Sidoff relies support her contention that the circuit court erred in this case, where the evidence showed either that Sidoff used deadly force that killed Sturzenegger or that Sidoff did not have any role in causing Sturzenegger's death. Under either view, the court did not have any reason to instruct on the privilege to threaten the use of force.

B. The Circuit Court Correctly Instructed On Self-Defense As Requiring An Intentional Use Of Deadly Force When The Defense Arises In A Case In Which The Use Of Force Results In A Death.

Sidoff contends that the self-defense instruction misled the jury by focusing its attention on the intentional use of deadly force and therefore "impliedly discounted her assertion that the fatal gunshot had occurred accidentally." Sidoff's Brief at 22. She cites only ***Ambuehl***, 145 Wis. 2d at 373-74, for this proposition. Sidoff's Brief at 22.

Sidoff's contention lacks merit. Sidoff does not dispute that the trial evidence justified a self-defense instruction. She also does not dispute that Sturzenegger's death resulted from an actual use of force. Moreover, she cannot dispute that section 939.48 defines the privilege to "use force against another" as a "privilege[ ] to . . . *intentionally* use force against another." Consequently, any self-defense instruction referring to the actual use of force, deadly or otherwise, must refer to the use as intentional. If a defendant does not agree with that statutorily required focus, the defendant must offer evidence refuting either intentionality or the actual use of force, not complain about an instruction that accurately reflects the statutory requirements for this aspect of the privilege.

In effect, Sidoff's contention here amounts to an alternative statement of the argument that the court should have included "threat" language in the self-defense instruction. The State has already addressed that claim, including Sidoff's reliance on ***Ambuehl***. The State relies on its response to Sidoff's claim regarding the "threat" language and will not repeat the response here.

C. The Circuit Court Properly Instructed The Jury On First- And Second-Degree Reckless Homicide.

Sidoff contends that the evidence did not justify instructions on the lesser-included offenses of first- and second-degree reckless homicide. Sidoff's Brief at 23-25.

> A circuit court need not instruct on a lesser included offense unless one of the parties requests the

> instruction and the evidence under a reasonable view in the light most favorable to the defendant "is sufficient to establish guilt of the lower degree and also leave a reasonable doubt as to some particular element included in the higher degree but not the lower." *State v. Bergenthal*, 47 Wis. 2d 668, 675, 178 N.W.2d 16 (1970). *See also Garcia v. State*, 73 Wis. 2d 174, 186, 242 N.W.2d 919 (1976). It is not error for the circuit court to fail to instruct *sua sponte* on a lesser included offense. *Hebel v. State*, 60 Wis. 2d 325, 210 N.W.2d 695 (1973). One rationale for this rule is that the circuit court should not unfairly interfere with the parties' trial strategy.

State v. Myers, 158 Wis. 2d 356, 364, 461 N.W.2d 777 (1990) (footnote omitted). "A refusal to give a lesser-included offense instruction when there exists a reasonable ground in the evidence for acquittal on the greater charge and for conviction on the lesser is error." ***State v. Michels***, 141 Wis. 2d 81, 95, 414 N.W.2d 311 (Ct. App. 1987).

This court should reject Sidoff's contention. First, Sidoff did not object to the instructions and therefore waived review of the claimed error. She therefore waived her right to raise this issue on appeal. ***Schumacher***, 144 Wis. 2d at 409. *See also* ***Booth***, 147 Wis. 2d at 211; Wis. Stat. § (Rule) 805.13(3).

Second, as the circuit court noted in denying Sidoff's postconviction motion, the record justified both instructions:

> In this case, depending on which part or parts of the defendant's testimony the jury chose to believe, there were reasonable views of the evidence which supported each of the verdicts submitted. There was a reasonable view of the physical evidence that indicated that the victim was shot execution-style by the

> defendant in order to steal the money she carried in her purse. This warranted instruction on First Degree Intentional Homicide. There is a different, but reasonable view based on the defendant's initial confession, that she used excessive force in protecting her child. This view warranted instruction on Second Degree Homicide (Unnecessary Defensive Force). The defendant's initial confession also indicated that she might not have intended to shoot the victim. This view warranted instruction on First and Second Degree Reckless Homicide.

(139:4-5, R-Ap. 106-07.)

The circuit court correctly applied the statutory criteria. The Wisconsin legislature has defined:

- "criminal recklessness" as meaning "that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk," Wis. Stat. § 939.24(1);

- first-degree reckless homicide as "recklessly caus[ing] the death of another human being under circumstances which show utter disregard for human life," Wis. Stat. § 940.02(1); and

- second-degree reckless homicide as "recklessly caus[ing] the death of another human being," Wis. Stat. § 940.06(1).

Wisconsin courts apply an objective rather than subjective standard to the element of "utter disregard for human life." ***State v. Edmunds***, 229 Wis. 2d 67, 75-76, 598 N.W.2d 290 (Ct. App. 1999); ***id.*** at 76 ("we apply an objective standard to the conduct which caused [the victim's] injuries"). *See*

also ***State v. Jensen***, 2000 WI 84, ¶ 23, 236 Wis. 2d 521, 613 N.W.2d 170 ("based upon the plain language of the [reckless-injury] statute, as well as the case law construing parallel predecessor statutes, the lower courts were correct to apply an objective standard to the evaluation of the 'utter disregard for human life' element"); ***State v. Blair***, 164 Wis. 2d 64, 70, 473 N.W.2d 566 (Ct. App. 1991) ("'Recklessness requires both the creation of an objectively unreasonable and substantial risk of human death or great bodily harm and the actor's subjective awareness of that risk.'").

Under section 940.02(1), "[t]he aggravating element, *i.e.*, circumstances which show utter disregard for human life, is intended to codify judicial interpretations of 'conduct evincing a depraved mind, regardless of life.'" ***Blair***, 164 Wis. 2d at 69-70. Consequently, cases interpreting the mental-depravity element "are instructive" on the meaning of conduct showing "utter disregard for human life." ***State v. Holtz***, 173 Wis. 2d 515, 519 n.2, 496 N.W.2d 668 (Ct. App. 1992).

Here, Sidoff said in her pre-arrest interview that she pointed a loaded pistol at the back of Sturzenegger's head, holding the gun close enough to touch Sturzenegger's head (170:Ex. 53, at 36-37, R-Ap. 260-61). This conduct objectively "creates an unreasonable and substantial risk of death or great bodily harm to another human being" and does so "under circumstances which show utter disregard for human life." Consequently, under a view of the evidence that credited Sidoff's pre-arrest statements that she placed the loaded pistol against the back of Sturzenegger's head and did not intend to kill, but that did not credit Sidoff's

contention that she "just thought the safety was on" (170:Ex. 53, at 35, R-Ap. 259), the circuit court did not have a basis for denying the State's request for an instruction on first-degree reckless homicide. *Cf.* ***State v. Davis***, 144 Wis. 2d 852, 855, 863-864, 425 N.W.2d 411 (1988) (confronting another person with a loaded gun that accidentally discharged during defendant's struggle with the victim showed a "depraved mind" within the purview of Wis. Stat. § 940.02(1) (1985-86 ed.)); ***State v. Bernal***, 111 Wis. 2d 280, 285, 330 N.W.2d 219 (1970) (unless privileged or otherwise defensible, the act of pointing a loaded gun at another person evinces an "utter disregard for life," whether the person holding the weapon intends to frighten, intimidate, or stop the other person and does not intend to shoot); ***Radej v. State***, 152 Wis. 503, 509-10, 140 N.W. 21 (1913) ("[F]or a person to point a loaded revolver at a vital part of another's body and discharge it, is to perpetrate an act imminently dangerous to others, and if done without excuse or justification and not in the heat of passion characterizing some lower degree of homicidal offense than murder in the second degree, evinces 'a depraved mind, regardless of human life.' Common sense teaches that."). Likewise, if given the option, the jury could theoretically have chosen to view Sidoff's conduct as not "show[ing] utter disregard for human life" but as nonetheless "creat[ing] an unreasonable and substantial risk of death or great bodily harm." This view justified an instruction on second-degree reckless homicide.

Third, even if included erroneously, the instructions on reckless homicide did not cause Sidoff any harm. The instruction properly required

the jury not to consider the lesser-included reckless-homicide offenses until it first failed to agree on both the first- and second-degree intentional homicide charges (165:2307, 2310-11, R-Ap. 400, 403-04). ***Dillon v. State***, 137 Wis. 655, 667-68, 119 N.W. 352 (1909); ***State v. McNeal***, 95 Wis. 2d 63, 68, 288 N.W.2d 874 (Ct. App. 1980) (citing *Dillon*). Because the jurors convicted Sidoff of first-degree intentional homicide, they did not consider either of the lesser-included reckless-homicide offenses. Consequently, their erroneous inclusion did not cause Sidoff any harm. *Cf.* ***State v. Truax***, 151 Wis. 2d 354, 363-65, 444 N.W.2d 432 (Ct. App. 1989) (where judge instructed jury on first- and second-degree murder, and jury convicted defendant of first-degree murder, omission of instruction on homicide by reckless conduct did not cause defendant any prejudice).

D. Because Neither The State Nor Sidoff Requested An Instruction On Homicide By Negligent Handling Of A Dangerous Weapon, The Circuit Court Did Not Err By Omitting The Instruction.

Sidoff contends that the circuit court erred by not giving an instruction on homicide by negligent handling of a dangerous weapon. Sidoff's Brief at 25-26.

The circuit court did not err. Neither party requested the instruction. "It is not error for the circuit court to fail to instruct *sua sponte* on a lesser included offense." ***Myers***, 158 Wis. 2d at 364.

IV. DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE.

Sidoff's claim of ineffective assistance of counsel arises in this context: at the ***Machner*** hearing (167), defense counsel testified that he and Sidoff agreed before trial on an "all or nothing" defense strategy (167:11:12, R-Ap. 422-23) — to seek an acquittal based on noninvolvement in the crime and risk a conviction on first-degree intentional homicide rather than offer the jury the option of convicting her on a homicide offense less than first-degree intentional homicide (167:15, R-Ap. 426 ("lesser included offenses pretty much were out the door when the splatter mark evidence was reported by the crime lab")). Sidoff did not testify at the ***Machner*** hearing.

A. Standards For Proving Ineffective Assistance Of Counsel.

Wisconsin courts have frequently stated the well-established standards for proving claims of ineffective assistance of counsel:

> We follow a two-part test for ineffective assistance of counsel claims. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687, *Johnson*, 153 Wis. 2d at 127. We have determined that an attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Johnson*, 153 Wis. 2d at 127 (quoting *Strickland*, 466 U.S. at 687). The defendant must also show the performance

> was prejudicial, which is defined as "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *State v. Guerard*, 2004 WI 85, ¶ 43, 273 Wis. 2d 250, 682 N.W.2d 12 (citing *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotations omitted). A movant must prevail on both parts of the test to be afforded relief. *Johnson*, 153 Wis. 2d at 127.

State v. Allen, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433. *See also, e.g.*, ***State v. Mayo***, 2007 WI 78, ¶ 33, 301 Wis. 2d 642, 734 N.W.2d 115.

> "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." "Rather, the case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms."

Fonte, 281 Wis. 2d 654, ¶ 23 (quoted sources omitted). *See also* ***Strickland v. Washington***, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); ***State v. Kimbrough***, 2001 WI App 138, ¶ 31, 246 Wis. 2d 648, 630 N.W.2d 752.

To prove ineffective assistance of counsel, a defendant must present clear and convincing evidence that counsel performed deficiently and that the deficient performance harmed the defendant.

Cf. ***Pierce v. Colwell***, 209 Wis. 2d 355, 360, 563 N.W.2d 166 (Ct. App. 1997) (in a prior direct appeal from criminal conviction, where defendant alleged ineffective assistance of counsel, defendant's "burden of proof . . . was the clear and convincing standard"); ***State v. Flores***, 158 Wis. 2d 636, 645 n.5, 462 N.W.2d 899 (Ct. App. 1990) ("the burden is on [the defendant] to establish his [ineffective-assistance] claim by clear and convincing evidence"), *overruled on other grounds by State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992); ***State v. Lukasik***, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983) ("clear and convincing evidence" as defendant's burden of proof for "proving ineffective counsel when that counsel is unavailable for response").[14]

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[14] Other States impose a "clear and convincing evidence" standard. ***Tall v. State***, 25 P.3d 704, 708 (Alaska Ct. App. 2001) ("The defendant has the burden of proving his counsel's lack of competence by clear and convincing evidence."); ***Huddleston v. State***, 5 S.W.3d 46, 50 (Ark. 1999) ("clear and convincing evidence" as defendant's burden of proof on a claim of ineffective assistance of counsel); ***Jones v. State***, 622 S.E.2d 1, 4 (Ga. 2005) (defendant "must rebut by clear and convincing evidence the strong presumption that his attorney was effective"); ***Thompson v. State***, 702 N.E.2d 1129, 1131 (Ind. Ct. App. 1998) (same); ***House v. State***, 44 S.W.3d 508, 515 (Tenn. 2001) ("The burden is on the petitioner to prove both prongs of the [*Strickland*] test by clear and convincing evidence.").

When assessing the alleged deficiency of defense counsel's performance, the court uses an objective standard:

> The function of a court assessing a claim of deficient performance is to determine whether counsel's performance was objectively reasonable. In making this determination, the court may rely on reasoning which trial counsel overlooked or even disavowed. Courts "do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." Professionally competent assistance encompasses a "wide range" of behaviors. "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight."

State v. Koller, 2001 WI App 253, ¶ 8, 248 Wis. 2d 259, 635 N.W.2d 838 (citations omitted).

Under the federal and Wisconsin constitutions, a defendant claiming ineffective assistance of counsel bears the burden of showing prejudice resulting from deficient performance. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996).

> A criminal defendant who claims ineffective assistance of counsel cannot ask the reviewing court to speculate whether counsel's deficient performance resulted in prejudice to the defendant's defense. The defendant must affirmatively prove prejudice.

State v. Wirts, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). *See also* ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (speculation does not satisfy the prejudice prong of *Strickland*).

In deciding an "actual ineffectiveness" claim, a court need not address both parts of the ***Strickland*** test if a defendant fails to meet the burden on one of them. ***Strickland***, 466 U.S. at 697. "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." ***Id.*** *See also* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (court need not address deficient performance if the court can resolve the ineffectiveness issue on the ground of lack of prejudice); ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990) (quoting *Strickland*).

At a ***Machner*** hearing,[15] the circuit court acts as the trier of fact, ***Kimbrough***, 246 Wis. 2d 648, ¶ 27, and

> has the responsibility, when acting as a trier of fact, to determine the credibility of each witness. *Gauthier v. State*, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965). A trial court can properly reject even uncontroverted testimony if it finds the facts underpinning the testimony are untrue. *See, e.g., Breunig v. Am. Family Ins. Co.*, 45 Wis. 2d 536, 544-45, 173 N.W.2d 619 (1970) (upholding verdict based upon jury's rejection of uncontroverted expert opinion testimony regarding negligent actor's mental disability). Even when a single witness testifies, a trial court may choose to believe some assertions of the witness and disbelieve others. *Nabbefeld v. State*, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978). This is especially true when the witness is the sole possessor

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[15] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

> of the relevant facts. *See Ring v. State*, 192 Wis. 391, 394, 212 N.W. 662 (1927). "If it were the law that the testimony of a witness in a given case, on a subject which is solely within his knowledge, must be taken as true one hundred per cent., justice in many instances would miscarry. It is the province of the [trier of fact] to carefully scan and review the entire evidence in connection with all the facts and circumstances of the case, and thereupon render [a] verdict . . . ." *Id.* at 395. We conclude, therefore, that the trial court in this case was free to accept or reject all or any portion of defense counsel's testimony as it deemed credible.

Id. ¶ 29.

B. Defense Counsel Did Not Provide Ineffective Assistance When He Refrained From Objecting To The Omission Of "Threat" Language From The Self-Defense Instruction.

Sidoff asserts that defense counsel provided ineffective assistance by failing to object to the omission of "threat" language from the self-defense instruction. For three reasons, this court should reject Sidoff's assertion. First, as already noted (pp. 24-29, above), the omission of "threat" language does not amount to error in the context of an actual homicide where a threat to use force merged quickly and seamlessly into an actual use of deadly force. Second, Sidoff has not demonstrated that the circuit court would have included the language even if defense counsel had requested it.[16]

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[16] *Cf. Stone v. Farley*, 86 F.3d 712, 717 (7th Cir. 1997) ("[f]ailure to raise a losing argument, whether at trial or on

(footnote continues on next page)

Third, Sidoff has not shown that adding the "threat" language would have had any impact on the jury's decision under the facts of this case, including "irrefutable physical evidence" (167:18, R-Ap. 429 (defense counsel testifying at *Machner* hearing)) showing an execution-style murder.

In short, defense counsel did not perform deficiently, nor did any deficiency cause Sidoff any prejudice. The circuit court therefore correctly rejected this claim of ineffective assistance of counsel.

C. Defense Counsel Did Not Provide Ineffective Assistance When He Refrained From Objecting To The Instructions on First- And Second-Degree Reckless Homicide.

Sidoff asserts that defense counsel provided ineffective assistance by failing to object to the instructions on reckless homicide. For three reasons, this court should reject Sidoff's assertion. First, as

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(footnote continues from previous page)

appeal, does not constitute ineffective assistance of counsel"). *See also* ***Strickland v. Washington***, 466 U.S. 668, 691 (1984) ("when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable"); ***id.*** at 687; ***A.M. v. Butler***, 360 F.3d 787, 795 (7th Cir 2004) (counsel not ineffective when he did not file motions that "would have been futile"); ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) (same); ***Quinn v. State***, 53 Wis. 2d 821, 827, 193 N.W.2d 665 (1972) (same).

already noted (pp. 30-35, above), the evidence justified the instructions. Accordingly, defense counsel correctly concluded that he did not have any basis for objecting to the State's request for the instructions (167:7-8, R-Ap. 418-19).

Second, Sidoff has not shown that the circuit court would have acquiesced in an objection by defense counsel. In denying Sidoff's postconviction motion, the court noted that it would have rejected an objection to the verdicts requested by the State,[17] thus demonstrating that the court would have rejected an objection to the corresponding jury instructions as well. *See supra* note 16 (counsel not ineffective when refraining from a futile act).

Third, even if counsel should have objected, the failure to object did not cause Sidoff any harm: the jury convicted her of first-degree intentional homicide and therefore never would have reached the lesser-included reckless-homicide offenses. *See* pp. 34-35, above.

Thus, defense counsel did not perform deficiently, nor did any deficiency cause Sidoff any prejudice. The circuit court therefore correctly rejected this claim of ineffective assistance of counsel.

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[17] *See* 139:5, R-Ap. 107 ("The state's requested verdicts satisfied the general evidentiary rule and it would have been an error not to include them. The court's decision would not have been changed by Trial Counsel objecting to the verdicts requested" (emphasis in original)).

D. Defense Counsel Did Not Provide Ineffective Assistance When He Refrained From Requesting An Instruction Homicide By Negligent Handling Of A Dangerous Weapon.

Sidoff asserts that defense counsel provided ineffective assistance by failing to request an instruction on the lesser-included offense of homicide by negligent handling of a dangerous weapon. For three reasons, this court should reject Sidoff's assertion. First, the evidence did not support an instruction on criminally negligent handling of the firearm. Viewed reasonably, evidence that Sidoff placed a loaded gun against the back of Sturzenegger's head does not allow a conclusion that Sidoff acted without criminal recklessness. Even if the weapon fired accidentally (as Sidoff claimed), the evidence supported a conviction for reckless homicide, ***Blair***, 164 Wis. 2d at 72 n.5, and precluded an instruction on homicide by negligent handling of a dangerous weapon, *see* ***Shelley v. State***, 89 Wis. 2d 263, 282-83, 278 N.W.2d 251 (Ct. App. 1979).

Second, as the circuit court noted when denying Sidoff's postconviction motion, instructions on lesser-included offenses did not comport with Sidoff's "all or nothing" defense strategy (139:6, R-Ap. 108). Defense counsel stated as much at the ***Machner*** hearing: "I certainly wasn't asking for any [instructions on lesser-included offenses] on the defense behalf, because that would be like contradicting the whole defense case" (167:8, R-Ap. 419). Although Sidoff now asserts that this instruction would not have conflicted with the "all or

nothing" strategy, *see* Sidoff's Brief at 28, she declares rather than demonstrates the validity of that assertion. An "all or nothing" defense, even in the face of strong evidence, does not fall outside the scope of reasonableness, nor does forgoing a lesser-included-offense instruction in order to remain consistent with the defense, ***Kimbrough***, 246 Wis. 2d 648, ¶¶ 31-32, especially when the defendant herself agreed to pursue a roll-the-dice, all-or-nothing, go-for-broke defense. Sidoff obviously does not like that decision now, but she cannot legitimately seek a do-over based on buyer's remorse.

Third, even if deficient, defense counsel's failure to request the instruction on this lesser-included offense did not cause Sidoff any harm: the jury convicted her of first-degree intentional homicide and therefore never would have reached the lesser-included offense of homicide by negligent handling of a dangerous weapon, the offense that would have occupied the last position in the decisional sequence. *See* pp. 34-35, above (discussing sequence for jurors' consideration of principal and lesser-included offenses).

In short, defense counsel did not perform deficiently by failing to request this instruction, nor did any deficiency cause Sidoff any prejudice. The circuit court therefore correctly rejected this claim of ineffective assistance of counsel.

V. THIS CASE DOES NOT MERIT A NEW TRIAL IN THE INTEREST OF JUSTICE.

Sidoff contends that the alleged errors in the jury instructions warrant exercise of this court's

authority to grant a new trial where "the real controversy has not been fully tried." Wis. Stat. § 752.35.[18] *See* Sidoff's Brief at 30-31.

To grant a discretionary reversal under section 752.35, this court "must be convinced, viewing the record as a whole, that there has been a probable miscarriage of justice . . . ." ***Rohl v. State***, 65 Wis. 2d 683, 703, 223 N.W.2d 567 (1974) (interpreting predecessor statute to Wis. Stat. § 752.35). *See also* ***State v. Ray***, 166 Wis. 2d 855, 875, 481 N.W.2d 288 (Ct. App. 1992). An appellate court should grant discretionary reversals under section 752.35 "infrequently and judiciously." ***Id.*** at 874.

This case does not come close to meriting a new trial in the interest of justice. Sidoff tried exactly the case she and defense counsel agreed to try: an all-or-nothing, go-for-broke verdict of either guilt

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[18] Section 752.35 accords this court discretionary authority to grant a new trial in the interest of justice:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Wis. Stat. § 752.35.

on first-degree intentional homicide (the original charge) or outright acquittal (167:12, R-Ap. 423). At the ***Machner*** hearing, Sidoff could have testified and disputed defense counsel's statement that they had agreed on this trial strategy before trial. She did not. A review of the trial record — from defense counsel's opening statement (151:182-212), through all the trial testimony, to counsel's closing argument (164:2220-74) — shows that defense counsel consistently followed that strategy.

Sidoff has not contended that she would follow a different strategy in a new trial. She has not indicated that she would — or could — present any new, compelling evidence to bolster her defense. She will find herself stuck once again with the obvious contradiction between (on one hand) her pre-arrest statement admitting that she killed Sturzenegger and (on the other hand) her trial testimony denying any involvement and shifting the blame to her husband. She has not suggested that the State could not present at a new trial all the same evidence it presented at this one.

Instead, she posits that adding "threat" language to the self-defense instruction, omitting the two instructions on reckless homicide, and adding an instruction on the lesser-included offense of homicide by negligent handling of a dangerous weapon will result in a trial of the real controversy.

Sidoff's position rests on three untenable assumptions. First, Sidoff assumes the circuit court erred and defense counsel performed deficiently with respect to the jury instructions. As explained earlier in this brief, this assumption lacks merit.

Second, Sidoff assumes the circuit court's alleged errors and defense counsel's alleged deficiencies caused her harm. As explained earlier in this brief, this assumption also lacks merit.

Third, Sidoff assumes that despite her admission that the gun fired when she touched it to the back of Sturzenegger's head, and despite the unrefuted evidence that the killing occurred execution-style rather than the way Sidoff described it, a jury would somehow conclude that she not only did not commit first-degree intentional homicide, but that her conduct amounted to a valid exercise of self-defense via a legitimate threat of force (thus exonerating her of any intentional homicide) and that Sturzenegger's death instead resulted from mere criminal negligence in the handling of the firearm. The evidence at trial of Sidoff's intentional commission of this crime (including evidence of her conduct during the days before and after the homicide) shows that this assumption goes beyond lack of merit and crosses into an Alice-in-Wonderland realm of nonsense.

To bolster her claim, Sidoff misleadingly asserts (in what seems like a *non sequitur*) that

> the testimony by Sidoff's trial counsel at the post-conviction hearing (167:11, 15-17[, R-Ap. 422, 426-28]) and the trial court's own written memorandum decision denying post-conviction relief (App. 104; 139:4[, R-Ap. 106]) suggest that those trial participants may have been confused about the jury's province to determine which versions of fact are credible or incredible with respect to lesser included offenses.

Sidoff's Brief at 31. Trial counsel's testimony and the circuit court's decision do not suggest anything of the sort. The circuit court's statement addressed the obvious point that a jury could choose which evidence to believe or disbelieve and that, "depending on which parts of the defendant's testimony the jury chose to believe, there were reasonable views of the evidence which supported each of the verdicts submitted" (139:4-5, R-Ap. 106-07). Trial counsel highlighted the "huge contradiction" between Sidoff's pre-arrest statement and trial testimony (167:11, R-Ap. 422) and how the contradiction between the blood-spatter evidence and Sidoff's pre-arrest statement sent "lesser included offenses pretty much . . . out the door" (167:15, R-Ap. 426). None of those remarks by the court and trial counsel suggest even a smidgen of a scintilla of confusion about the jury's province to decide facts.

In summary, Sidoff presented the case she deliberately chose to present (and would ultimately find herself constrained to present at any new trial), and the jury fully tried the case as she presented it. She does not like the result, and she wants a do-over. But buyer's remorse does not justify a new trial in the interest of justice, especially when the new trial would look, for all practical purposes, identical to the first.

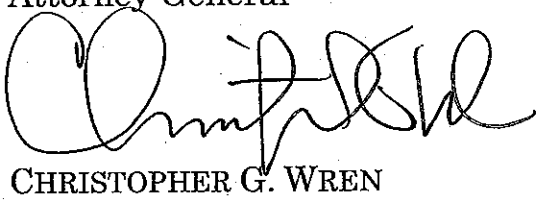
CONCLUSION

For the reasons offered in this brief, this court should affirm the circuit court's decision denying Sidoff's motion for postconviction relief and should affirm the judgment of conviction.

Date: February 11, 2009.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General



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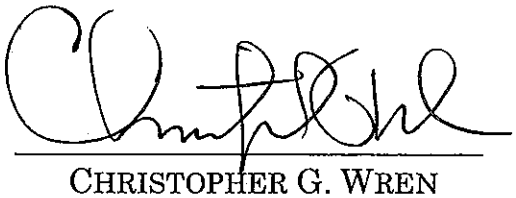
CERTIFICATION

In accord with Wis. Stat. § (Rule) 809.19(8), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 10,426 words.



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